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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 14

W. A. YARBOROUGH, *Petitioner,*

versus

SADIE YARBOROUGH, *by her Guardian Ad Litem,*
R. D. Blowers, Respondent.

BRIEF FOR RESPONDENT

STATEMENT

This action was brought in the Court of Common Pleas for Spartanburg County on August 20, 1930, by the respondent, minor child, against her father, the petitioner, for maintenance, education and support. Hereinafter the petitioner will be referred to as defendant, and the respondent as plaintiff.

The complaint alleged substantially that she was an only child of the defendant, resided with her mother in Spartanburg, S. C., and was without funds and dependent upon her father; that the defendant was a resident of Atlanta, Ga. The sum of $2,119.50 belonging to the defendant was attached in Spartanburg, and the defendant was personally served with the summons and complaint, answered and appeared personally.

The Yarboroughs were married at Spartanburg, S. C., on September 3, 1904, where they lived until September 5, 1926, when they moved to Atlanta. The plaintiff was born in July of 1914. Mrs. Yarborough and the plaintiff have, since leaving Atlanta, lived in Spartanburg, except for a short while spent in Hendersonville, N. C., during the summer of 1927. The defendant filed a suit for divorce in Atlanta on September 21, 1927. Mrs. Yarborough was served by publication, but later filed a cross bill and personally appeared.

On January 12, 1928, by order of the Georgia Court, Yarborough was required to pay the wife $125 per month for her support, and $75 per month for the support of the child, "until the further order of the Court or the final disposition of this case." (R. pp. 89-90.)

On petition of Yarborough, the allowances for the wife and child were twice reduced. On January 17, 1929, the first jury trial resulted in a verdict of divorce. No allowance for either wife or child was fixed by this verdict. On January 19, 1929, a decree, consented to by the wife and Yarborough and their respective attorneys, was passed by which $1,750 was paid to Mrs. Yarborough, and a like amount to R. D. Blowers as trustee for Sadie Yarborough, the order further providing that "upon compliance with this order by the plaintiff, he shall be relieved of all payments of alimony and counsel fees." The right of Yarborough to custody of the daughter for part time was reserved in this order.

On June 7, 1929, a verdict of a second jury was had authorizing a total divorce. On the same day, an order was passed annulling the marriage and granting liberty to both parties to marry again. No mention of alimony for the wife or allowance for the daughter was made in this order or the second verdict of the jury. (R. 96.)

The defendant re-married in August of 1929, about two months after the total divorce was granted.

A decree was entered in the Spartanburg Common Pleas Court on August 21, 1931, by which the attached funds were turned over to a trustee, from which plaintiff was to be paid fifty dollars per month.

An appeal to the Supreme Court resulted in an affirmance on June 27, 1932, of the decree on Circuit. The defendant petitioned for a rehearing, and, on December 22, 1932, in a second opinion, this petition was denied. On petition of defendant, a writ of certiorari to this Court was granted May 8, 1933.

SUMMARY OF THE ARGUMENT

Point A

The decree of the Georgia Court providing for the support of the minor child did not conform to the provisions of the Georgia Law, and therefore was not *res adjudicata* of her right to support.

Point B

The minor daughter, respondent here, was not a resident of Georgia at the time the divorce suit was brought; was not a party to the suit, and therefore the holding of the South Carolina Court that the Georgia Court did not have jurisdiction is not in violation of the Full Faith and Credit clause of the Federal Constitution, and is not *res adjudicata* of her right to support.

ARGUMENT

Point A

The decree of the Georgia Court providing for the support of the minor did not conform to the provisions of the Georgia law, and therefore was not *res adjudicata* of her right to support.

Section 2981 of the Georgia Code provides: "If the jury, on the second or final verdict, find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support; and in what manner, how often, to whom and until when it shall be paid." (R. 102.)

The order of Judge Pomeroy awarding $1,750 to the minor was passed January 19, 1929, two days after the first verdict of the jury, and nearly five months before the second and final verdict. Neither verdict made mention of the support for the minor. Twice before the temporary support for the minor had been changed. It will be observed that the code provides that the jury in specifying alimony for the wife shall also specify permanent support for the children. Judge Pomeroy's order further provides that upon compliance with his order petitioner shall be relieved of all payments of alimony and counsel fees. It does not relieve him from further *support* of the child. By reading the Georgia code, it will be seen that ALIMONY is one thing and PERMANENT SUPPORT of the minor is another. In addition, Mrs. Yarborough testified that she understood the right was reserved to ask for more support for the minor. (R. 71.) By the terms of the order passed April 17, 1928, the petitioner, W. A. Yarborough, was allowed the privilege of visiting his daughter, and of having her with him at stated times. (R. 90.) On December 7, 1928, another order was passed re-affirming the right of the petitioner to see and visit

with his minor daughter. (R. 93.) In the order awarding the $1,750 for the minor appears the following provision: "The provisions of the order of the Court heretofore entered fixing the times and the places when plaintiff, W. A. Yarborough, shall have the right to visit and have with him, out of the presence of the defendant, the said Sadie Yarborough, minor daughter of plaintiff and defendant, are hereby continued in force." (R. 95.) Thus indicating that the Court recognized the right of the petitioner to have custody of the child part of the time and his obligation by implication necessarily to support her.

"An allowance of alimony is distinct from an allowance which a husband may be required to pay for the maintenance of the children, and hence alimony is not to be construed as an award for the support of a child of the marriage whose custody is also awarded to the wife." 9 R. C. L. 482.

"The legal and natural duty of the father to support his children is not to be evaded by him on the ground of his wrongdoing, or even of any dissensions whatsoever with his wife. A natural father would not think of doing so, and an unnatural one should not be permitted to do so." 9 R. C. L. 481.

"Contract between father and mother of minor children for a separation held not to release parental rights from the father to the mother, within Civil Code 1910, 3021, nor relieve the father from obligation to support the children." *McCarter v. McCarter*, 74 S. E. 308; 10 Ga. App. 754.

"The conduct of the mother, or her refusal to live with the father, is no defense to a prosecution for abandonment of the child." *Moore v. State*, 57 S. E. 1016; 1 Ga. App. 502.

In *Tillman v. Tillman*, 93 S. C. 281; 76 S. E. 559, the Supreme Court of South Carolina held: "The judgment

of a Court as to custody of children is never *final* (italics added), for it must at all times be free to act upon such a change of conditions as requires a change of custody." If the Court can change the custody, the necessity for changing the degree of support may follow.

In *Buckminster v. Buckminster*, 38 Vt. 248; 88 Am. Dec. 652, the Court held: "A decree made at the time of the divorce cannot anticipate the changes which may occur in the condition of the parents, or in their habits and character, and their fitness to have the custody and care of the children." Nor can such a decree anticipate the ability of the father to support the child nor the necessity of the child. An absolute divorce terminates the marriage relations, but not so with the relation of the father to his child. The obligation to support it remains.

"Some cases hold that while the judgment is *res adjudicata* in the state of its rendition, and elsewhere as far as the parents are concerned, it is not *res adjudicata* as to the right of some other state where the children may subsequently be, to determine the custody of the children as their welfare may require." 9 R. C. L. 477.

Point B

The minor daughter, respondent here, was not a resident of Georgia at the time the divorce suit was brought; was not a party to the suit, and therefore the holding of the South Carolina Court that the Georgia Court did not have jurisdiction is not in violation of the Full Faith and Credit clause of the Federal Constitution, and is not *res adjudicata* of her right to support.

It should be borne in mind that the wife and child were living in Spartanburg, S. C., when the divorce suit was begun; the child was never within the jurisdiction of the

Georgia Court, was not a party to the divorce suit, was never served with any process in that case, nor was she represented therein by a guardian ad litem.

"It is a universal principle as old as the law that the proceedings of a court without jurisdiction are a nullity and its judgment without effect either on the person or property. Hence it is a principle of natural justice that before the rights of an individual can be bound by judicial sentence, he shall have notice, either actual or constructive, of the proceedings against him, or in other words that the court shall have jurisdiction. This rule applies to personal actions and proceedings in rem." 14 R. C. L. 1031.

Likewise, Section 401 of the Civil Code of South Carolina provides, "when an infant is a party, he must appear by guardian, who may be appointed by the Court in which the action is prosecuted, or by a judge thereof, or a Judge of Probate, Clerk of Court, or by a master in those counties where the office of master now or may hereafter exist."

"The only method known to our law for bringing an infant before a Court is by guardian ad litem, who is appointed to conduct the defense of the infant who has no discretion to select an attorney to represent him." *Turner v. Barraud*, 102 Va. 324; 46 S. E. 318.

In *Carrigan v. Drake*, 36 S. C. 354, the Supreme Court of South Carolina held: "A guardian ad litem must be appointed for an infant defendant before a valid judgment can be rendered against him."

In *Burnett v. Summerlin*, 110 Ga. 349; 35 S. E. 655, the Georgia Supreme Court said: "A judgment against a minor defendant who has been served with process does not bind her where no guardian ad litem was appointed."

"In partition proceeding, in which guardian ad litem for infant defendant, on petition of father, with whom she re-

sided. without notice to infant, and in which service on infant was accepted by her father for her, the Court did not have jurisdiction over infant." *Lanham v. Bomar,* 123 S. C. 483; 124 S. E. 635.

In *Brandon v. Brandon,* 154 Ga. 661; 115 S. E. 115, the Court held: "Ohio divorce decree awarding custody of child to wife is not entitled to obligatory enforcement in Georgia under the full faith and credit clause of the United States Constitution and the statute on the same subject (Civil Code 1910, Section 6672) where the husband resided in Georgia and was served by publication."

In *Cason v. Cason,* 123 S. E. 713, the Georgia Court said: "The Court was without power and authority to award the custody of the children to the mother on the temporary hearing for a period of time in extent of the final verdict and decree in the case."

"In the strict sense of the term parties to a judgment or decree, in the eye of the law, are those only who are named as such in the record, and are properly served with process, or enter their appearance, etc." 15 R. C. L. 1009; *Orthwein v. Thomas,* 127 Ill. 554; 21 N. E. 430.

In *Haddock v. Haddock,* 201 U. S. 561, this Court held: "The mere domicil within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the Federal Constitution against a non-resident who did not appear and was only constructively served with notice of the pendency of the action."

In *Haddock v. Haddock,* Supra, this Court said:

"It must always be borne in mind that it is elementary that where the full faith and credit clause of the constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the

Court by which the decree was rendered is open to enquiry. And if there was no jurisdiction, either of the subject matter or of the person, of the defendant, the Courts of another state are not required, by virtue of the full faith and credit clause of the constitution, to enforce such decree." *National Exchange Bank v. Wiley,* 195 U. S. 259; 25 S. Ct. 70.

We have found no exception to the rule that a judgment of a foreign court is not binding upon any state under the full faith and credit clause of the United States Constitution, where the court of the foreign state had not acquired jurisdiction of the person whose rights were sought to be affected. As Mr. Justice Bonham so well said in his very able opinion denying the rehearing in this case, "Acceding to the proposition that the state, in proper circumstances, must give full faith and credit to the judgments of other states of the union, it does not follow that such judgments may not be collaterally attacked for the purpose of showing that the foreign court did not have jurisdiction of the person whose rights are affected by the judgment."

CONCLUSION

When the divorce suit was begun the wife and daughter were in South Carolina, (sent there by the husband and father). Jurisdiction of the wife was obtained by personal service and her appearance. The daughter was never in the jurisdiction of the Georgia Court, was never served with any process, and no representative appeared for her. The plaintiff was a citizen of South Carolina, and therefore the decree of the Georgia Court is not *res adjudicata* of her support.

Respectfully submitted,

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